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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 STEVE SANDS,

4 Plaintiff,

5 v.

18 Civ. 7345 (JSR)

6 CBS INTERACTIVE, INC.,

7 Defendant.

8 -----x
9 New York, N.Y.
February 22, 2019
4:00 p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13 APPEARANCES

14 LEIBOWITZ LAW FIRM, PLLC
15 Attorneys for Plaintiff
16 BY: RICHARD LIEBOWITZ
JAMES H. FREEMAN

17 COWAN, DEBAETS, ABRAHAMS & SHEPPARD, LLP
18 Attorneys for Defendant
19 BY: ELEANOR M. LACKMAN
20 LINDSAY R. EDELSTEIN
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23
24
25

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(Case called)

THE COURT: Good afternoon. We have three motions. There is the parties' competing motions for summary judgment, and then there is the motion for leave to amend from the defendant.

The motion for leave to amend is denied. I am very doubtful that it has any merit, that the claim has any merit, but quite aside from that, I don't reach that because it is grossly untimely.

Everything is done in this case except today's argument. We are ready for trial. We are going to set the trial in about 30 seconds.

Of course, since I am not dismissing on the merits but just on the grounds of untimeliness, the dismissal or the denial of the motion is without prejudice. If you feel you want to file a separate lawsuit with respect to this dubious claim, you're welcome to.

Second, assuming the case were to go to trial, how long a trial does plaintiff's counsel envision?

MR. FREEMAN: Well, your Honor, if it were to be a jury trial, we would envision three days.

THE COURT: You want a jury trial. Didn't you ask for a jury trial?

MR. FREEMAN: We did. We did not discuss a possibility of a bench trial with the defendants yet. We would

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1 be open to a bench trial in terms of efficiency.

2 THE COURT: It is a jury trial, how long?

3 MR. FREEMAN: Three days.

4 THE COURT: Does defense counsel agree with that.

5 MR. LACKMAN: I think two at least three days. We
6 don't think there are a lot of witnesses in this case.

7 THE COURT: All right. I have my calendar.

8 What days in April are you not available for trial?

9 MR. FREEMAN: Your Honor, I know I'm on vacation one
10 week in April. It is the week of the 14th. My brother's 50th
11 birthday.

12 THE COURT: Even without your mentioning that, which
13 of course tugs at my heart strings, I was not going to
14 interfere with your vacation. It won't be the week of the
15 14th.

16 What about defense counsel?

17 MR. LACKMAN: I have a trial that starts on March 26.
18 It may go two weeks long, so it would perhaps be after
19 Mr. Freeman is back. That would be the best time to proceed.

20 THE COURT: Lets look at late April. Let me ask my
21 courtroom deputy.

22 What about April 22 or April 29?

23 THE DEPUTY CLERK: April 29 you're at Fordham in the
24 morning only. April 22 is fine. Then the 24th, we start a
25 trial.

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1 THE COURT: Lets put it down for April 22 at 9:00 a.m.
2 That is also Earth day, so...

3 THE DEPUTY CLERK: You do leave on that coming weekend
4 for Brazil.

5 THE COURT: The subsequent week?

6 THE DEPUTY CLERK: Yes.

7 THE COURT: But they are saying a three-day trial.

8 Now, lets turn to the motions for summary judgment.
9 Lets turn first to the issue of liability. I'll ask counsel to
10 go to the roster when we're having this argument.

11 Let me ask defense counsel why you believe the
12 copyright office's certification that the photographs at issue
13 were registered is inconclusive.

14 MR. LACKMAN: Well --

15 THE COURT: No. Over there. Sorry.

16 MR. LACKMAN: That's all right.

17 THE COURT: That's because when you stand at the
18 table, the microphone really can't pick you up.

19 MR. LACKMAN: That's fine.

20 Well, actually, the presumption of validity, as the
21 copyright office issues registration certificate, is easily
22 rebutted. It can be rebutted whether there is other evidence
23 in the record that casts doubt on the question. This is the
24 Arvant case in the Second Circuit --

25 THE COURT: What do you say is the rebuttal here?

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1 MR. LACKMAN: There are a couple issues. One is that
2 this is a derivative work. There is no indication to any --

3 THE COURT: What is your basis for saying it is a
4 derivative work?

5 MR. LACKMAN: The photograph is a creation, a
6 recordation of what Marvel was recording at the time, the
7 costuming, the lighting.

8 THE COURT: As I understand it, Mr. Sands was not
9 copying something or deriving something from a motion picture
10 or some other audiovisual work. He was photographing real
11 people from particular angles and particular viewpoints that he
12 brought to bear. I don't understand why you think it is a
13 derivative.

14 MR. LACKMAN: Sure.

15 It is true that he was taking pictures of live action.
16 These were actually characters who were costumed and lit and
17 other things by Marvel. But the fact of the matter is that the
18 Copyright Act doesn't require that the underlying work be
19 fixed, it just requires that it is a work.

20 So a derivative work can be created by a -- Section
21 102 is very clear, it has a separate requirement between a work
22 and a fixation. So a derivative work just needs to be a copy
23 of a work, and the work that was being created and expressed
24 there is essentially like a stage play. If someone was
25 recording video from the balcony of a theatrical production,

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1 the production live is still a work whether or not it is fixed.
2 The derivative work requirement does not require the underlying
3 work be fixed in a tangible medium.

4 THE COURT: Well, all right.

5 What other objections do you have to the presumption?

6 MR. LACKMAN: Well, there is also the fact that we
7 received -- we asked for evidence very early on regarding the
8 metadata in the photos. We got a bunch of evidence that was
9 not on point that consisted of -- it is cases and things like
10 that.

11 What we really wanted to know and to confirm -- there
12 are so many photos that look the same, even Mr. Sands said,
13 yes, there are a lot of these. I can't tell the difference
14 between these photos. We wanted to make sure that what was
15 registered is what he took. He never provided his metadata to
16 us, and when we received information on the registrations, when
17 it was provided to us, it was accessed two days before the
18 deposition, but not provided to us until the evening of the
19 last day of fact discovery.

20 We didn't even realize that there might be an issue.
21 Mr. Sands testified that on the day he takes the photos, he
22 sends them over. The information that was provided to us on
23 January 18, at around six o'clock, was --

24 THE COURT: Discovery is closed.

25 MR. LACKMAN: Well, that is correct.

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1 THE COURT: Excuse me.

2 I make it extremely easy for the parties to a lawsuit,
3 if they are having problems during discovery because some side
4 is not providing them with timely responses or there is some
5 other problem of any kind whatsoever, all they need to do is
6 jointly call the court pursuant to my individual rules and I
7 usually get them an answer right then and there, certainly
8 within a matter of hours.

9 MR. LACKMAN: Understood, your Honor.

10 THE COURT: So all matters relating to discovery that
11 have been raised were resolved, and I am not going to hear any
12 further ones at this time.

13 MR. LACKMAN: Of course, your Honor.

14 The point is that I was assured by plaintiff's counsel
15 that all relevant documents had been provided before the
16 deposition, which happened on January 10.

17 THE COURT: That, in your view, that wasn't true or
18 that they were too belated?

19 MR. LACKMAN: That's correct.

20 THE COURT: Which one?

21 MR. LACKMAN: It wasn't true.

22 THE COURT: It wasn't true?

23 MR. LACKMAN: That --

24 THE COURT: So your remedy is to ask for an additional
25 deposition.

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1 MR. LACKMAN: Well, there just wouldn't be time. The
2 documents were provided on the last day of discovery. We just
3 wouldn't have time. We think --

4 THE COURT: No, no. My point is this: What you could
5 have done is call the court jointly with your adversary -- it
6 would be extremely easy, especially if you were conducting the
7 deposition, you would both be there in the same room -- and
8 say, Judge, in addition to the deposition today, we want
9 discovery extended for the limited purpose of taking additional
10 discovery of this plaintiff as soon as we get the documents
11 that we either haven't gotten or were belatedly produced.

12 But you didn't do that.

13 MR. LACKMAN: Well, Judge, maybe I'm not being clear.

14 What happened was that the deposition happened on the
15 10th. Prior to that time, we were assured that all responsive
16 documents had been provided. During the deposition, there was
17 some indication that there was some metadata, and in
18 addition -- we didn't know this -- but apparently the Leibowitz
19 firm had a bunch of information that they didn't provide and
20 they actually accessed it two days before. They said you'll
21 have all the documents prior.

22 THE COURT: Have you received --

23 MR. LACKMAN: We were --

24 THE COURT: Excuse me.

25 Have you received that all now?

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1 MR. LACKMAN: We received it on the night of the close
2 of fact discovery.

3 THE COURT: So you've received it?

4 MR. LACKMAN: Correct, and we would like to ask the
5 plaintiff about this material at trial.

6 THE COURT: Well, I am not sure how it bears on the
7 presumption issue.

8 How is it going to bear on the presumption issue?

9 MR. LACKMAN: There are problems or inconsistencies in
10 his testimony that pertain to what was provided, and we
11 actually cannot know whether the material that the photos that
12 he took were actually the photos that were provided to the
13 Leibowitz firm because it conflicts directly with his
14 testimony, and we had no basis to know that until we were more
15 than 48 hours after the deposition happened.

16 THE COURT: All right. So anything else on the
17 presumption issue?

18 MR. LACKMAN: No, your Honor, not on this specific
19 issue.

20 THE COURT: Let me hear from plaintiff's counsel.

21 MR. FREEMAN: All right. Thank you, your Honor.

22 In terms of the validity of the copyright, they have
23 failed to present any evidence to rebut the validity of the
24 copyright. Not only do we have a valid copyright registration
25 form, but both parties sent to the U.S. Copyright office, after

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1 the pendency of this litigation was commenced, a request for
2 the copyright office to produce official certified deposit
3 copies showing that the photographs were, in fact, on deposit
4 with the copyright office. There is no question of fact in
5 terms of whether the photographs are on deposit.

6 What they seem to be speculating -- and it is pure
7 speculation -- is that Mr. Sands is not the true author of
8 these particular photographs, and we have placed an abundance
9 of evidence on record showing that Mr. Sands was, in fact --
10 is, in fact -- the true author and photographer of these
11 photographs, including screenshots from his laptop computer.
12 And, of course, he is sworn to it.

13 THE COURT: There is no discrepancy in his testimony.

14 What about their complaint that not everything that
15 should have been produced was produced before his deposition,
16 and some of it even was as late as the day before the close of
17 discovery?

18 MR. FREEMAN: After, at the deposition was the first
19 time, to my knowledge, that they asked for underlying metadata
20 to the photographs. In fact, the day after the deposition, the
21 morning after, opposing counsel sent me a laundry list of
22 document requests which were not a part of her original
23 document requests and said, we need to get all this stuff and
24 what did we do.

25 We went, and we went back to the client and we said,

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1 We need to compile whatever else you have, you know, please
2 search your records. We want to comply. We did comply. We
3 gave them everything they wanted, even though they didn't
4 initially ask for those documents. Had we known prior to the
5 date of the deposition that they were seeking such information,
6 we, of course, would have provided it. It is our policy to
7 just hand it over.

8 THE COURT: Yes.

9 The deposition was when?

10 MR. FREEMAN: On January 10.

11 THE COURT: Discovery closed?

12 MR. FREEMAN: The 26th.

13 MR. LACKMAN: 18th.

14 MR. FREEMAN: 18th.

15 THE COURT: They made this request right after the
16 deposition?

17 MR. FREEMAN: Correct.

18 THE COURT: Then you responded before the close of
19 discovery, albeit not only very shortly before the close of
20 discovery, correct?

21 MR. FREEMAN: Correct. My client did have to --

22 THE COURT: All right. So let me go back to defense
23 counsel.

24 So these were documents that you only requested after
25 the deposition. And, of course, you could have set the

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1 deposition much earlier, but you chose, or jointly chose, to
2 fix it shortly before the close of discovery.

3 You find out at the deposition that there is documents
4 that you hadn't previously requested that you now want. That
5 is not untypical of what happens at a deposition. So you
6 promptly request them, but you had to know at that very moment
7 that they might occasion a further deposition of the plaintiff,
8 so that was the time when you should have approached the court.

9 MR. LACKMAN: Your Honor, I want to make sure, to
10 clarify a couple points.

11 One is these documents were requested in our original
12 request. We had at least one, maybe two meet-and-confers prior
13 to the deposition. We wanted to get all documents in as soon
14 as we could. We had discovery period that overlapped the
15 holidays and the earliest we could do after -- we were still
16 getting documents in December. The earliest we could do was
17 January 10.

18 And the documents we received were in the possession
19 of plaintiff's counsel. They were documents that they used,
20 they intended to use to support their argument that their
21 photos were validly registered. We had a defense regarding
22 that point, and they never produced -- plaintiff's counsel
23 never produced those documents. And they were accessed, the
24 document we received showed that they were accessed by
25 plaintiff's counsel on January 8. They didn't provide them at

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1 the deposition or otherwise, and we received them not the day
2 before the last day of discovery, but roughly -- I was in
3 California when they showed up, I don't know the exact time,
4 but I know it was dark in LA -- on the last day of fact
5 discovery.

6 THE COURT: All right. So here is what I will allow,
7 even though, in my view, defense counsel still has not been
8 diligent in seeking relief for all you're now complaining about
9 before the close of discovery. That was your time when, as I
10 say, it would have been so easy to convene a call, but you
11 didn't remember.

12 Nevertheless, because I'm well-known for my
13 generosity, I will give you a two-hour additional deposition of
14 the plaintiff to be completed by no later than Friday of next
15 week. You may then, if you feel on the basis of that
16 deposition that you have some additional information bearing on
17 summary judgment to bring to the attention of the court, you
18 may file a supplement to your summary judgment papers by no
19 later than Tuesday of the following week.

20 So lets put dates on this. The deposition, the
21 two-hour telephonic deposition must occur by March 1.

22 Defendant's additional papers, limited to five
23 double-spaced pages, must be filed by Tuesday, March 5.

24 Any answering papers must be filed by Friday, March 8.

25 I will hold off ruling on the motions until I receive

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1 those papers.

2 I will tell you in advance that I am extremely
3 skeptical of your argument about this not being an original
4 work, but feel free to make whatever arguments you want.

5 Lets turn to the question of willfulness. Frankly,
6 there, it seems to me, there are genuine issues of material
7 fact that remain to be resolved, but I'll hear anything anyone
8 wants to further say beyond your -- I've looked at your papers,
9 obviously.

10 Lets hear first on that from plaintiff's counsel and
11 then defense counsel.

12 MR. FREEMAN: Thank you, your Honor.

13 So the issue of willfulness, when dealing with the
14 defendant, who is in the publishing industry, a sophisticated
15 defendant in the publishing industry, our position is that the
16 evidentiary threshold necessary to establish willfulness is
17 particularly low. And this is actually embodied in the case
18 law, which holds that a publisher is charged with knowledge of
19 copyright law, particularly if they have experience in
20 exploiting copyrights, they have experience in licensing
21 copyrights, they have policies, procedures, training manuals in
22 place.

23 If they are engaged in activity that is infringing, if
24 they are engaged in activity where they have not done any due
25 diligence, whatever, to obtain a license or find out who the

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1 photographer is, there is a very strong presumption that they
2 have acted in reckless disregard of the photographer's rights.

3 We have never taken the position of de facto
4 willfulness. We just feel that the evidentiary threshold,
5 again, is very low. We start in that position. It would be
6 different if we were suing a restaurant or a bowling alley who
7 also exploit copyrights. They are not in the business of
8 exploiting copyrights.

9 Here, this is what CBS does. So we've established,
10 number one, they obviously are in the publishing industry. We
11 asked during discovery for a plethora of information relating
12 to what policies they had in place, what training manuals they
13 have in place. They claim they employ independent contractors
14 to post photographs to the website.

15 OK, so what do they know about licensing photographs?
16 Are they just hired and just, you know, given open access to
17 the website and they can just post photographs at will, or is
18 there some supervising editor? They didn't produce anything.

19 During the entire course of this litigation, they
20 produced nine pages of documents. They said they didn't have
21 any evidence of training manuals. They didn't have any
22 evidence of employee handbooks. What does that tell us? That
23 tells us that they don't have any procedures in place and that
24 maybe sometimes they license photographs and maybe sometimes
25 they don't. I guess it just depends on who has access to the

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1 website. So, again, we are looking at a large-scale
2 corporation who are posting photographs online without
3 bothering to conduct any due diligence whatsoever.

4 In addition, they have admitted, though, that they do
5 use standard licensing agreements for photographs every now and
6 then. So they must have some inkling, right, that there is a
7 requirement that they obtain permission from the photographer.
8 So, again, we have either they have no policies at all, or if
9 they do, they failed to implement them in this particular case.

10 Now, their sole defense is that the individual who
11 they claim posted the photographs online they believe had
12 harbored a subjective good faith belief that these photographs
13 were publicity handouts distributed by Marvel Studios or
14 Netflix. The producers or the distributor of the film.

15 Unfortunately for them, there is not a shred of
16 objective evidence on the record that that is what happened.
17 Now, why do we say that? Because we know that they got the
18 photographs from another website, a competing website,
19 *Comingsoon.net*.

20 Now, this website had Steve Sands, this website was an
21 authorized sublicensee of Steve Sands' works. They acquired
22 the photographs from Getty. So Steve Sands takes the
23 photographs, he uploads them to Getty, and then Getty makes
24 them available to whoever wants to license them.

25 So in this case, *Comingsoon.net* licensed them via

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1 their parent company, Evolve Media, and *Comingsoon.net* had an
2 authorized license to display those photographs online. The
3 editor of CBS Interactive went and simply shoplifted the
4 photographs from the website and republished them on
5 *gameesspot.com*.

6 They are saying, well, he believed that these were
7 publicity handouts from Marvel. OK, well, that belief must be
8 objectivity reasonable under the circumstances. What evidence
9 is there on the record to support that subjective good faith,
10 alleged good faith belief?

11 THE COURT: Who is this person?

12 MR. FREEMAN: Dan Otty.

13 THE COURT: Was his deposition taken?

14 MR. FREEMAN: His deposition was not taken, your
15 Honor.

16 THE COURT: Was any affidavit or declaration produced
17 from him?

18 MR. FREEMAN: Yes. They produced an affidavit. In
19 the affidavit, which is mostly speculative, he doesn't recall
20 the details. He says he doesn't even know where he got the
21 photographs from, which is a huge red flag, but he says that
22 because there is a *Comingsoon.net* watermark on the photographs,
23 that, oh, he must have got them from *Comingsoon.net*.

24 Now, had he harbored a good faith belief that these
25 were publicity handouts, one would imagine that such

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1 photographs would have on them a watermark indicating that they
2 belonged to Marvel Studios or to Netflix and would say, for
3 example, for promotional uses only and here is the terms.
4 There is no evidence of that. Had he got them, for example,
5 from the Netflix website or from Marvel's website, from a
6 publicity or press kit, a digital press kit, a hard copy press
7 kit, this would be a very much different case.

8 But for them to come into court and say, oh, well
9 there is this custom and practice without any evidence -- there
10 is this custom and practice of movie studios handing out the
11 still shots to promote the film, and I was aware of that custom
12 and practice and I thought that this was just not a bunch of
13 publicity stills.

14 THE COURT: I got the point.

15 MR. FREEMAN: You get the point?

16 THE COURT: Yes. Thank you very much.

17 Let me hear from defense counsel. Thank you.

18 MR. FREEMAN: Thank you.

19 MR. LACKMAN: Your Honor, I think your Honor hit the
20 nail on the head in a way. Your Honor is also talking about
21 the opportunity to take discovery. Mr. Otty was disclosed as
22 the editor of the overall website. There was no deposition
23 notice. There was no attempt to take a deposition. There was
24 nothing.

25 The documents that were requested were wildly

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1 overbroad. They wanted all kinds of information, and we told
2 them, you need to send us a narrow request. They didn't do it.

3 So what happened in this instance, Mr. Otty testified
4 to his state of mind and his understanding, and the concept
5 that there is no custom and practice is belied by Mr. Sands own
6 testimony. Studios do hand out publicity materials in order to
7 get promotion for their upcoming works. This is a custom and
8 practice, and it is widely known and widely used.

9 So there was certainly a reason for him to believe
10 that, and if they don't believe it, you can't create an issue
11 of fact just by speculating. You have to take the person's
12 deposition. Ask for his testimony and cross-examine him with
13 those points, but it is right now it is unrebutted.

14 THE COURT: All right. I will reserve judgment.

15 The next issue was the plaintiff's request for
16 attorneys' fees. This really is, in effect, premature because
17 I don't reach that unless I find that the various defenses to
18 liability were frivolous, etc.

19 I don't need to hear argument. It is a function of
20 what I find with respect to those particular elements. When I
21 say premature, it is proper to file it at this time, I just
22 mean there is no point for oral argument, since it is really
23 derivative, to use a bad term from the arguments, on liability.

24 The final item is the defendant seeks summary judgment
25 on the question of whether this is a single work, and I thought

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1 this has been resolved -- but let me hear from defense
2 counsel -- by the copyright office's rule regarding group
3 registration of photographs.

4 MR. LACKMAN: Sure.

5 Actually, we have a copy of it with us. I just want
6 to preface the fact that it was posted this morning. Judge
7 Batts ruled on this issue and determined -- it is not a
8 question about whether it is a single work. The question is
9 whether plaintiff gets one damages award or multiple damages
10 awards.

11 Our argument is it is a damages question. We actually
12 have a copy. If the court needs it, we can hand up a copy of
13 the ruling from this morning. As soon as we received it, we
14 provided it to them this morning.

15 THE COURT: Let me take a look.

16 MR. LACKMAN: Hold on just a second.

17 (Pause).

18 MR. LACKMAN: Should the court want it, we have copies
19 of the registrations that were at issue in the case as well.

20 Your Honor, in this ruling, Judge Batts found that
21 where a copyright holder chose --

22 THE COURT: What page are you looking at?

23 MR. LACKMAN: That's a really good question.

24 It is page 13, your Honor.

25 THE COURT: Hang on a minute.

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(Pause)

MR. LACKMAN: Where it begins Mindent cites Ryan and other cases and it ends --

THE COURT: Let me just read it.

MR. LACKMAN: Sure.

THE COURT: Thank you.

(Pause)

Of course I'm seeing this for the first time now, but it doesn't appear, on a very quick look of this, that Judge Batts discusses at all the impact, if any, of the copyright office's rule regarding group registration of the photographs.

My understanding is that that ruling makes clear that "The office will examine each photograph in the group and if the claim is approved, the registration covers each photograph and each photograph is registered as a separate work. Thus, if the photographs are subsequently infringed, the copyright owner should be entitled to seek a separate award of statutory damages for each individual photograph."

Now, that was issued on January 18, 2018. I don't know if it was brought to the attention of Judge Batts, who does not address it in her opinion of yesterday, but that is the issue I'm raising.

MR. LACKMAN: Well, there is that issue.

We believe that Judge Batts is correct in that the type of registration is the same, but there is a separate

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1 point, which it is not -- just because you can sue separately
2 on a separate work, there is law -- and we have cited it in our
3 brief -- that says even if something is registered as a
4 collective work, if it is registered as a set with a nearly
5 identical title on the same date from the same shoot, the
6 copyright act would likely consider it a compilation and,
7 therefore, there is nothing that says that you get separate
8 statutory damages awards.

9 THE COURT: Well, no, no. That is apparently the kind
10 of precedent that Judge Batts -- again, on a very quick reading
11 of her ruling -- seems to be relying on. But the copyright
12 office's rules, if it is binding on the court, seems to say
13 just the opposite.

14 MR. LACKMAN: The copyright office's rule says that it
15 is possible. It doesn't say that it is required.

16 Based on the facts here --

17 THE COURT: Well, it says "thus if the photographs are
18 subsequently infringed" -- and we're talking now about a group
19 registration -- "the copyright owner should be entitled to seek
20 a separate award of statutory damages for each individual
21 photograph."

22 So the keyword there is "should." Now it may not be
23 binding on me, but they are making an assertion of law, it
24 seems to me.

25 MR. LACKMAN: Well, the law is, and the commentators

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1 are clear, Bill Patry says, Patry and Copyright says that valid
2 registration satisfies the prerequisites for suing thereby
3 permitting but not requiring a separate award of statutory
4 damages per work.

5 In cases we cited, such as Yellow Pages v. ZIPLOCAL,
6 they found that, you know, there was one award appropriate
7 where the photographs were taken of one subject by one
8 photographer at a single session. The evidence in the record
9 shows that Mr. Sands licenses per shoot and not per photograph.

10 THE COURT: All right.

11 MR. LACKMAN: Therefore, under these circumstances,
12 for both of those reasons, this is one of these types of uses
13 that allows Mr. Sands to claim one award of statutory damages,
14 not five.

15 THE COURT: All right. Let me hear from plaintiff's
16 counsel.

17 MR. FREEMAN: Thank you, your Honor.

18 It is not often, actually, you use the word frivolous,
19 because I'm a member of the plaintiff's bar and that word gets
20 thrown around a lot, but this is a case where there is a bright
21 line between a compilation and a group registration of
22 photographs.

23 Every single case that they cite in their principal
24 brief and their reply brief deals with compilations and
25 collective works. In this Circuit, according to the expressed

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1 understanding of the statute, you only get one statutory
2 damages award for a compilation. Had Steve Sands registered a
3 compilation with the intent to create a coffee table book of
4 all of his photographs of the Marvel characters, he would only
5 be entitled to one work.

6 This group registration, however, is not that at all.
7 It is a registration with 736 photographs that were organized
8 according to one parameter, the date. There is no originality.
9 Compilation has to have some sort of minimum threshold of
10 originality to become a compilation. Here, it is just a group
11 registration that was administratively organized according to
12 dates.

13 All the cases that they have cited, including the
14 Yellow Pages citation from the Eleventh Circuit, is a
15 compilation case. Now, in this Circuit and in other circuits,
16 they have what is called an economic, independent economic
17 viability exception to the compilation rule. Here, we don't
18 follow that in the Second Circuit. But other circuits, they
19 say, well, if you register a compilation and one of the
20 portions or components of that registration is economically
21 viable as an independent work, then if you can prove that it is
22 independent, you might get an exception to the rule that under
23 compilations you only get one work. The Second Circuit has
24 repeatedly rejected that argument and has held fast to the
25 statutory language.

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1 Here, we are not dealing with a compilation. We are
2 not dealing with a collective work. The registration satisfies
3 the three prerequisites: It is the same photographer, all the
4 paragraphs are registered in the same calendar here, and it is
5 the same copyright claimant.

6 To sort of close the deal on that, there is the group
7 registration of photographs 83F32542-01. This is a regulation
8 where they say the office -- it is a comment to the regulation.
9 The office will examine each photograph in the group, and if
10 the claim is approved, the registration covers each photograph
11 and each photograph is registered as a separate work. Thus, if
12 the photographs are subsequently infringed, the copyright owner
13 should be entitled to seek a separate award of statutory
14 damages for each individual photograph.

15 That is coming directly from the registrar, your
16 Honor.

17 THE COURT: All right. Did you want to say anything
18 about the case with Judge Batts, since I'm told you were
19 furnished with a copy of it?

20 MR. FREEMAN: Yes, I was.

21 As soon as I saw it, I went right to the back and I
22 saw that she was dealing with a compilation and a collective
23 work. This case has nothing to do with the group registration,
24 which is just really an administrative component or
25 administrative benefit for the copyright hold that they don't

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1 have to register each photograph separately. It would be way
2 too expensive and way too burdensome. That method of
3 registration does not in any way, shape, or form limit the
4 amount of statutory damages.

5 I would also just like to add, your Honor, there is
6 two other defenses that they've asserted to liability -- fair
7 use and unclean hands -- both of which, again, seem to be
8 throw-away defenses. We spent ten pages briefing the fair use
9 defense, and their opposition was less than a page. And the
10 substantive argumentation was in footnote on fair use.

11 The unclean hands defense, it is very rare, but it
12 only applies if the alleged misconduct is somehow related to
13 this litigation. In their brief, they are talking about
14 e-mails that Steve Sands exchanged involving an entirely
15 different production, Iron Fist. So, I mean, by their own
16 admission, and they cited that rule that it has to be related
17 to this litigation. The unclean hands defense should be
18 dismissed as well as the fair use claim.

19 THE COURT: All right.

20 MR. LACKMAN: Your Honor.

21 THE COURT: Yes. Go ahead.

22 MR. LACKMAN: I'm sorry, your Honor.

23 THE COURT: Again, go to the microphone.

24 MR. LACKMAN: Yes.

25 I'm not sure if your Honor wanted argument or to be

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1 heard on the fair use or unclean hands defense. I am certainly
2 prepared to argue that.

3 I just wanted to point out to the court that
4 Mr. Freeman has misrepresented the cases that were cited in our
5 reply brief. At page nine, there are cases involving group
6 registration. And worse, I have -- I have handed up the
7 copyright registration issue in the case the decision issued
8 yesterday posted this morning. It says application title group
9 registration.

10 So this is exactly on point. We don't dispute that
11 the party may be entitled to seek such award, but what we have
12 here is that there is no evidence that would suggest that he
13 would be entitled to an award. And in situations where that is
14 a factor, where that can be decided by the court, the facts
15 there are the same as the facts here. It is page two.

16 THE COURT: Hold on a minute. Just a minute.

17 MR. LACKMAN: Yes.

18 THE COURT: Thanks.

19 (Pause)

20 Well, just to say, I'm just seeing Judge Batts'
21 opinion for the first time. But what she seems to be saying is
22 is that, in fact, it was a compilation, however denominated.
23 She talks about, at page 12 of her opinion, about situations
24 where you can get separate awards. But then she goes on to
25 say, The court finds that under these facts, where a copyright

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1 holder chose to assemble into a collective hold, certain
2 photographs during the registration of its copyright, i.e.,
3 registering them in sets rather than as individual photograph
4 of works, the copyright holder has created a collective work in
5 compilation as those terms are defined in Section 101.
6 Therefore, the copyright holder is limited to recovery of one
7 award, one award of statutory damages, per se."

8 That seems to be quite different from what the issue
9 is here.

10 MR. LACKMAN: Well, if your Honor turns to the second
11 page of the record, it does say group registration, but that is
12 one of two arguments as well.

13 What I want to make sure is understood is that, in
14 addition to that, even in the circumstances where they say you
15 may be entitled to multiple awards, courts actually addressing
16 the issue have time and again repeatedly said that when the
17 works are presented under the same title, done at the same
18 time, taken on the same day, then that entitlement goes away.

19 There are cases in our brief and in our reply brief as
20 well that do talk about this specific point as well.

21 THE COURT: All right. Thank you very much.

22 MR. LACKMAN: Does your Honor want to hear on fair use
23 or unclean hands?

24 THE COURT: No. I had not inquired previously about
25 those because I felt I understood from the papers all I needed

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1 on those points. If there is something you're dying to say on
2 that...

3 MR. LACKMAN: Sure.

4 I just want to make it clear, we are not waiving, to
5 your Honor's point of prematurity of fees, we are not waiving
6 any arguments on fair use. Given where we are in the case, we
7 wanted to get to the main merits. Certainly there is the way
8 that they characterized the purpose of the photos and the way
9 we characterize the purpose of the photos is different.

10 THE COURT: Well, if one party makes an argument in
11 ten pages and the other argument responds in one page, I am
12 also predisposed towards favoring the latter, but we'll see how
13 it plays out in this case.

14 MR. LACKMAN: Thank you, your Honor.

15 We have page limits we try to prioritize. Certainly
16 with respect to unclean hands, I mean, we have laid it out in
17 our papers, and we just believe that this approach of a
18 plaintiff who barges onto sets and sets up and settles cases
19 for the purpose of trying to satisfy a willfulness presumption,
20 that is not the way the court system is supposed to work, your
21 Honor.

22 THE COURT: All right. I thank both counsel for this
23 helpful argument.

24 Because of the additional short telephonic deposition
25 and the papers that follow from that, I won't be able to give

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1 you an immediate ruling, but I will certainly get you a ruling,
2 worst case, by the end of March. Since trial is not until
3 April 22, that will be more than adequate time.

4 Anything else we need to take up today?

5 MR. FREEMAN: Not from the plaintiff, your Honor.

6 Thank you.

7 MR. LACKMAN: Not for defendant. Thank you.

8 THE COURT: Very good. Thanks very much.

9 (Adjourned)

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